IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 24130 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COLOURTEX & 1 - Petitioner(s)

Versus

UNION OF INDIA THR' SECRETARY & 4 - Respondent(s)

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Appearance :
MR KAMAL TRIVEDI,SENIOR ADVOCATE FOR M/S TRIVEDI & GUPTA for Petitioner(s) : 1 - 2.
MR JITENDRA MALKAN for Respondent(s) : 1,
MR RJ OZA for Respondent(s) : 2,
None for Respondent(s) : 3 - 5.
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 12/01/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 This petition primarily and substantially challenges order dated 6/12/2005 made by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), West Zonal Bench, Mumbai as well as the reference made by Division Bench of CESTAT on 12/8/2005.

2 Heard Mr.K.B.Trivedi, learned Senior Advocate appearing on behalf of the petitioner and Mr.R.J.Oza, learned Additional Standing Counsel for Central Government appearing on behalf of respondent No.2. Taking into consideration the controversy and necessity of finally disposing of the question brought before the Court the petition is taken up for final

hearing and disposal today. **Rule**. Mr.Oza waives service.

BRIEF FACTS.

3 On 19/12/2003 vide Order-in-Original made by respondent No.2 redetermining the FOB value of the exports and consequent reduction in DEPB credit, the petitioner was held to be not entitled to the originally granted credit. The said order came to be challenged by way of an Appeal before CESTAT. On 12/08/2005 the Division Bench comprised of Vice President and Member (Technical) heard the appeal and both of them expressed differing opinions: The Vice President allowed the appeal filed by the petitioners while Member (Technical) rejected the appeal. Thereupon both of them made reference stated to be in terms of provisions of Section 129C(5)of the Customs Act,1961 (the Act). The order making the so called reference reads as under:

"The following difference of opinion is placed before the Hon'ble President for reference to Third Member for resolving the difference :-

Whether the appeals are required to be rejected as held by Member (Technical)

OR

Whether the appeals are required to be allowed as held by Vice President.

Sd/- Sd/-
(Moheb Ali M) (Jyoti Balasundaram)
Member (Technical) Member(Judicial)

4 The difference of opinion was accordingly referred to the President of CESTAT who assigned the matter to a Third Member to hear on the point on which there was difference of opinion between the members constituting the original Bench. Before the Third Member took up the hearing, the petitioners moved an application seeking Rectification of Mistake on 29/9/2005 under Section 129B(2) of the Act. While the application for rectification was pending, the reference came up for hearing before the Third Member on 10/10/2005. The petitioner requested for adjournment on the ground of pendency of the Rectification of Mistake Application, but the

request was turned down. The Third Member called for the papers of the Rectification of Mistake Application and disposed of the same on the same day stating that there was no scope for filing the application for Rectification of Mistake at the stage of hearing on the point of difference.

5 The said order dated 10/10/2005 came to be challenged by way of Special Civil Application No.20771 of 2005 and this Court vide judgment and order dated 14/10/2005 quashed and set aside the said order dated 10/10/2005. In paragraph No.5 of the said judgment it was stated by this Court :

> *"5. It is not necessary to deal with the merits of the controversy between the parties. Section 129C(5) of the Act is, couched in clear unambiguous terms. The Third Member who is assigned the matter by the President is required to hear only on the point or points on which there is difference of opinion amongst the Members of the Bench who heard the appeal originally. The Third Member can decide only such point or points because the President can make reference only on such point or points of difference of opinion. The Third Member cannot derive any further jurisdiction because the matter has thereafter to be placed before the Bench which originally heard the appeal and*

the appeal is required to be disposed of in accordance with majority of opinion of the Members".

6 The matter therefore, came up for hearing once again on 20/10/2005 before the Third Member. On behalf of the petitioner it was pointed out that as there was no statement on the point or points of difference provisions of Section 129C(5) of the Act had not been complied with and hence, the Third Member accordingly adjourned the matter to 10th & 11th November,2005 so as to enable the petitioner to seek appropriate relief.

7 The petitioner therefore approached this Court once again vide Special Civil Application No.21526 of 2005. On 24/10/2005 the Court permitted the petitioner to withdraw the petition and made the following order :

"1.Mr.K.B.Trivedi, learned Senior Advocate appearing on behalf of the petitioners, seeks permission to withdraw the petition, so as to

enable the petitioners to approach the learned President of Customs, Excise and Service Tax Appellate Tribunal so as to seek a direction to the Bench which originally heard the appeal to state the point or points on which there is a difference of opinion between the members constituting the Bench in light of requirements of provisions of Section 129C(5) of the Customs Act,1962. During the course of hearing reliance was placed on decisions of Patna High Court in the case of Hanutram Chandanmul Vs. Commissioner of Income-tax, Bihar & Orissa, [1953] XXIII ITR 505 (Patna) and Karnataka High Court in the case of Joint Commissioner of Income-tax (TDS) Vs. Jindal Tractbel Power Co.Ltd. & Anr.,[1999] 240 ITR 189(Kar.) in support of the proposition that the Third Member cannot proceed with the hearing, if the questions are not framed on which there is a difference of opinion. Reliance was also placed on decisions of Allahabad High Court in the case of Jan Mohammed Vs. Commissioner of Income-tax, U.P. & V.P. Lucknow, [1953] 23 ITR 15 (All.) and Madras High Court in the case of Income-tax Officer, Company Circle-ii(i), Madras & Ors., Vs. Vice President, Income-tax Appellate Tribunal, Madras & Ors., [1985] 155 ITR 310 (Mad.) in relation to the powers of the Third Member.

2 It is not necessary to deal with any aspect of the controversy on merits considering the fact that the petitioners are seeking permission to withdraw the petition so as to enable the petitioners to approach the learned President as well as the original bench with a request to formulate the point or points on which there is a difference of opinion amongst the members constituting the bench. Permission granted. The petition stands disposed of accordingly."

8 The petitioner accordingly moved an

application which was addressed to the learned President of the Tribunal. However, the Registry of the Tribunal at New Delhi refused to accept the said application and advised the petitioner to file the same at Mumbai, since according to the Registry the matter pertained to Mumbai Bench. The application was therefore, after necessary amendment, filed at Mumbai. The said application came up for hearing on 6/12/2005 before the very Division Bench consisting of the two Members who had expressed dissenting opinions on 12/8/2005.

9 After hearing both the sides the Bench passed an order on 6/12/2005 rejecting the said application and while doing so observed as under :

> *"7. While the proposition that the third Member can only decide the point or points which have been referred to and can neither formulate a new point or direct the Members of the referring bench to act in a particular manner or to re-decide the particular point is a settled position of law, in the present case it is to be noted*

that a clear finding has been recorded on every issue arising for determination in the appeals (of which the present applicant was one of the appellants), in paragraph 25 of the order recorded by Member (Technical). He has held that -
(a) the goods have been overvalued;
(b) therefore, they are liable to confiscation under Section 113(d) of the Customs Act;
(c.) as a consequence thereof, penalties on all the appellants are required to be upheld;
(d) FOB value is required to be redetermined; and
(e) DEPB credit is required to be consequently reduced.
On each of these issues, the Vice President has expressed a diametrically opposite view. Therefore, the difference as framed has a bearing only on these issues. It is, therefore, very clear that the third Member is only required to concur with the findings either of the Member (Technical) or of the Vice President on all the above issues. An occasion to reframe the question may arise in a case where there is ambiguity in the question referred. However, in the present case the difference as framed is clear, unambiguous and unequivocal, and therefore occasion for reframing the same does not arise."

10 It is in the aforesaid backdrop of facts and circumstances of the case this petition has come up before this Court. When the matter came up before the Court on 19/12/2005 the Advocate of the petitioner was orally directed by the Bench to approach the learned President of the

Tribunal personally to ensure that provisions of Section 129C(2) of the Act are complied with by the Division Bench of the Tribunal.

11 On 6/1/2006 the Registrar, CEGAT, New Delhi has addressed a communication to the petitioner with copy endorsed to Registrar General of the High Court. In the said communication the Registrar has reproduced the extract of the order made by the learned President on the application dated 21/12/2005 moved by the petitioner before the learned President. It is necessary to reproduce the relevant extract from the observations made by the learned President :

> *"6. The provisions of Section 129C(5) of the Customs Act,1962 clearly require that if the members of the bench are equally divided, they shall state the point or points on which they differ and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case,*

including those who first heard it.

7 It appears that an omnibus order was made on 12.8.05 by the Hon'ble Vice President and the Hon'ble Member (Technical) making the reference to third member for resolving their differences by stating whether the appeals were required to be rejected as held by the Member (Technical) or were required to be allowed as held by the Hon'ble Vice President.
7.1 Section 129C(5) mandatorily requires the Hon'ble Members who are equally divided to state the point or points on which they differ."

12 After recording the aforesaid opinion the learned President felt handicapped in making any order and hence went to observe :

"Since the matter is pending before the Hon'ble the Gujarat High Court in Special Civil Application No.24130 of 2005, against the order of the Mumbai Bench passed on 6.12.05 seeking a direction requiring the Members to state the point or points on which they differed, and since the matter was already referred to the third Member, which is pending before that member, it will not be appropriate for the President to comment on the correctness of the order made by the Mumbai Bench rejecting the application to state the point or points on which the members differ. In view of the Hon'ble High Court having been seized of the same issue in Special C.A.No.24130 of 2005, which can now be only judicially decided, in view of the order of the Division Bench, Mumbai on 6.12.05, there is no scope for the President to make any administrative order in the matter as prayed for in this application."

SUBMISSIONS :

13 Mr.K.B.Trivedi, appearing on behalf of the petitioner, after narrating the aforesaid sequence of facts and events submitted that in light of the judgment of Patna High Court in the case of Hanutram Chandanmul (1953) 23 ITR 505 the order dated 6/12/2005 made by Division Bench of the Tribunal and the reference should be held to be bad in law and the Bench be directed to make a proper reference. He also placed reliance on the Apex Court decision in the case of Commissioner of Income Tax Vs. Anjum M.H.Ghaswala and others (2002) 1 SCC 633 with special reference to the observations in paragraph No.27 at page 644 of the reports to submit that once an authority is required to act in a particular manner or exercise its jurisdiction in a manner stipulated by the provisions, the authority was bound to act accordingly and could not deviate from doing so. During course of hearing attention was also invited to the submission made on behalf of the

revenue before the Tribunal to the effect that the Tribunal had always been adopting this course of action while making reference and no error had been committed in the reference made.

14 As against that Mr.R.J.Oza appearing on behalf of respondent No.2 placed reliance on the elaborate affidavit-in-reply dated 10/1/2006 to contend that the points of difference had already been set out by both the Members constituting the Division Bench which originally heard the appeals and as they only differed in the conclusion the reference was made accordingly warranting no interference. It was submitted that parties be directed to proceed with the hearing of the reference which was pending before the Third Member. He also placed reliance on judgment of Delhi High Court in the case of A.N.Seth Vs. Commissioner of Income Tax (1969) 74 ITR 852 with special reference to the observation made at page 860 in relation to

second question before the Delhi High Court.

REASONING.

15 As can be seen from the extract of the reference made by the Division Bench of CESTAT the so called difference of opinion requires the Third Member to decide whether the appeals are required to be rejected as held by the Member (Technical) OR the appeals are required to be allowed as held by Vice President. On a plain reading it is apparent that no point or points different have been stated by the Members constituting the original Bench. Provisions of Section 129C of the Act read as under :

> *"[(5) If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority; but if the members are equally divided, they shall state the point or points on which they differ and make a refrence to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of these members of the Appellate Tribunal who have heard the case, including those who first heard it".*

Though Section 129C of the Act is described as pertaining to 'Procedure of Appellate Tribunal' when sub-section (5) of the said Section is read, it becomes apparent that it is a substantive provision, and not merely procedural. The provision provides not only for stating point or points of difference and for making a reference, but after the reference is made investing the President or the Third Member as the case may be, who takes up hearing of the reference on point or points of difference in a case where the Members of the Bench are equally divided with powers to undertake such a hearing, which is not a hearing of the appeal or appeals.

16 Section 129C(5) of the Act requires that where Members of Tribunal differ in opinion on any point, in the first instance, the point shall be decided according to the opinion of the majority; only in the event where the Members are equally divided, the Members are obliged to

state the point or points on which they differ and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Tribunal, and such referred point or points shall be decided according to the opinion of the majority of these members who have heard the case, including those who first heard it.

17 The provision is therefore comprised of two parts. In a case where the Bench consists of two or more than two members and there is difference of opinion amongst the members who constitute the Bench, the point of difference has to be decided according to the opinion of the majority, where there is a majority. While the latter part of the provision stipulates that where the Bench consists of two members or more than that but of even number, and the members are equally divided, it is incumbent upon such

members to set out the point or points on which they differ. Upon such point or points of difference being stated a reference is required to be made to the President who, on the administrative side, is required to pass an order for placing the case for hearing either before himself or before any other member or other members, as the facts and circumstances of the case may require, but the case, upon such a reference being made, can be heard by the President or the Member or Members only on the point or points of difference stated by the original Bench which heard the appeal. The President or the Third Member deos not derive any independent jurisdiction and has no powers to decide the appeal in entirety.

18 The legislative intent discernible from a plain reading of the provision is to ensure that the appeal or appeals are to be disposed of only by the Bench originally assigned the appeal or

appeals as ordered by the President on the administrative side. This becomes clear from a conjoint reading of sub-sections (1) and (4) of Section 129C of the Act. Sub-section (5) of Section 129C of the Act stands out in contrast and does not permit disposal of the appeal. In fact, after the President or the Third Member, who is assigned the case for hearing on the point or points of difference, renders his opinion the appeal goes back to the Bench which originally heard the appeal and has to be decided in accordance with the majority opinion. This becomes absolutely clear when the concluding portion of the provision is read which talks of deciding according to the opinion of the majority of the members who have heard the case, including those who first heard it.

19 Therefore, the members who expressed dissenting opinions are bound by the statute to state the point or points of difference and make

reference after making such a statement. To use the words of the learned President “an omnibus order” cannot take place of the statement on point or points of difference between the members. The entire appeal(s) cannot be referred.

20 There is one more reason as to why the legislature in its wisdom has provided for this requirement, viz.,stating the point or points of difference as a pre-condition for making the reference. In a given case, and it is not unknown that, though the members may express dissenting views they might ultimately arrive at the same conclusion, or there could be a situation where by a different process of reasoning the same conclusion may be arrived at by the members constituting the Bench. In such a case there would be no point or points of difference on which a reference could be made, though there might be a different line of reasoning adopted by

each of the members constituting the Bench. The decision in case of A.N.Seth (supra) on which reliance has been placed on behalf of respondent No.2 is an illustration of such an eventuality. As can be seen from the facts recorded at page 856 of the reports though both the members took different views ultimately both the members agreed that the intention of the assessee (in that case) at the time of sale of plots was to sell the land with a view to earn the profits and that the gains were liable to be taxed as revenue income. In fact the appeals were allowed by the Tribunal and there was no difference of opinion stated for reference to the President. The second question which was there before Delhi High Court was in the context of the aforesaid difference in reasoning adopted by both the members and hence while answering the second question the Delhi High Court observed thus :

“In other words, the Members disagreed in

> *the reasoning adopted by them in arriving at a conclusion on the point for determination in the appeal, but agreed with each other on the conclusion on the point. As they were agreed about the final conclusion on the point for determination in the appeal viz. that the profits made by the assessee should be subjected to income-tax, they did not make any reference".*

The said decision is no authority for upholding the action on part of the Division Bench.

21 Therefore, the necessity for stating point or points of difference. In absence of such a statement any reference made would be invalid and cannot be termed to be a mere procedural irregularity. The observations made by the Tribunal (Original Bench) while passing the order on 6/12/2005 are not in accordance with the legal requirements of Section 129C(5) of the Act. After referring to the judgment of Patna High Court in Hanutram Chandanmul (supra) the Bench has chosen not to follow the ratio of the said decision in

the following words :

> *"However, in the case before us it is not the appeal or appeals which have been referred to third Member, but only the point of difference as to whether the appeals merited rejection in the light of the view recorded by Member (Technical) or the appeals merited acceptance in the order recorded by Vice President".*

All that can be said about this observation is that it belies comprehension. In one breath the learned Members seek opinion of Third Member as to allowability or rejection of the appeals and also that the appeals have not been referred. Possibly the learned Members have not appreciated the true import of provision of Section 129C(5) of the Act.

22 There is one more aspect of the matter.As the facts go to show the petitioner had moved an application before the learned President of the Tribunal. The Registry at New Delhi took it upon itself to direct the petitioner to approach the Bench at Mumbai without appreciating the

controversy which was raised by the petitioner and on which it sought an order from the President pursuant to the oral directions made by this Court. Once the application was addressed to the President the Division Bench could not have taken up the said application for hearing and hence the order dated 6/12/2005 is also bad in law on this limited count. The Registry of the Tribunal may be manned by highly competent officers but there are situations where in the peculiar facts of the case, it is necessary to place the application before the authority for whom it is meant and to whom it is addressed, as in this case before the learned President. If that was done, at a proper stage, possibly the litigation could have been avoided, atleast this round. As can be seen from the prayer made in the application, which reads as :

> *"(a) that the order of reference to the Hon'ble Third Member be recalled and thereafter, to refer the matter back to the Two Hon'ble Members for stating the point or points on which they differ and thereafter, refer the matter*

to the Hon'ble Third Member".

The same could have been granted by the learned President only and therefore also the Members of the Bench could not have taken up for hearing and disposal, the application addressed to the learned President.

23 In the aforesaid facts and circumstances of the case, not only the order dated 6/12/2005 (Annexure-A) made by CESTAT but also the so called reference made on 12/8/2005 are hereby quashed and set aside, leaving the respective opinions expressed by the members constituting the original Bench untouched. As a consequence any order made by the learned President making a reference to the Third Member, including the case which is pending before Third Member for hearing becomes infructuous. The original Division Bench which heard the appeals and wherein the Member (Technical) and Vice President expressed

dissenting opinions is directed to formulate and state specific point or points of difference and then refer the same to the learned President as required by the provisions of Section 129C(5) of the Act.

24 The petition is allowed accordingly. Rule made absolute. There shall be no order as to costs.

Sd/- Sd/-
(D.A.Mehta,J) (H.N.Devani,J)

m.m.bhatt